

From: [Holloman, Rachel](#)
To: [Rosenblatt, Daniel](#)
Cc: [Goodis, Michael](#)
Subject: Draft response FIFRA-Prop 65 Issue
Date: Friday, June 01, 2018 2:01:34 PM

b5 *Privileged attorney-client
communication*

Let's discuss. I just talked to Erin. [REDACTED]

[REDACTED] thought it already had the old Prop 65 statement on the product.

When I talked to Reuben, he looked it up and he did not see it on the label. I need to discuss.

Hi Matt,

This is in response to your email sent to Ed Messina on Wednesday, March 30, 2018. In the email you reference a delay in the Agency's processing of a your client's, Harvest Power, request to add a Prop 65 statement to a mulch product that contains two pesticides. You also mentioned that the reason for the Prop 65 statement is due to wood dust being listed on OEHHHA's Prop 65 List. Neither of the pesticides in your clients product are on OEHHHA's Prop 65 List. As you know, EPA registers pesticides for sale and distribution across the United States under *Federal Insecticide, Fungicide, and Rodenticide Act* (FIFRA). In doing so, EPA reviews and approves pesticide labeling ensuring, among other things, that the labeling is not false or misleading and that it contains statements that are necessary to adequately protect health and the environment. In your client's case there is no false and misleading statement about the pesticides in the product base on the Prop 65 statement. Therefore, we will process your action

From: Goodis, Michael

Sent: Thursday, May 31, 2018 7:57 AM

To: Holloman, Rachel <Holloman.Rachel@epa.gov>

Cc: Baris, Reuben <Baris.Reuben@epa.gov>; Rosenblatt, Daniel <Rosenblatt.Dan@epa.gov>; Davis, Donna <Davis.Donna@epa.gov>

Subject: FW: FIFRA-Prop 65 Issue

Hi Rachel

See the inquiry below.

Can you prepare a response for me to send to matt please.

A couple of things – should clarify that Prop 65 does not require the notification to be on the product. As discussed, there are other ways to notify consumers.

Also CA's new warning statement is out for public comment. I think we mention we are having discussions with CA considering it is not a EPA/FIFRA requirement.

Michael L. Goodis, P.E.

Director, Registration Division (RD)

Office of Pesticide Programs (OPP)

Phone 703-308-8157

Room S7623

From: Davis, Donna

Sent: Thursday, May 31, 2018 5:24 AM

To: Messina, Edward <Messina.Edward@epa.gov>

Cc: Goodis, Michael <Goodis.Michael@epa.gov>; Rosenblatt, Daniel <Rosenblatt.Dan@epa.gov>

Subject: Re: FIFRA-Prop 65 Issue

Ed, we've got it. We will formulate a response and be sure to follow up with Matt and will keep you

in the loop.

Donna

Sent from my iPhone

On May 30, 2018, at 6:22 PM, Messina, Edward <Messina.Edward@epa.gov> wrote:

FYI – Am I correct to assume that this is something that RD would handle? If so, please reach out or feel free to provide me with an appropriate response.

Thanks,

Ed

Ed Messina

Acting Deputy Office Director (Programs)

Office of Pesticide Programs

U.S. EPA

(703) 347-0209

From: Morrison, Matthew W. [<mailto:matthew.morrison@pillsburylaw.com>]

Sent: Wednesday, May 30, 2018 4:44 PM

To: Messina, Edward <Messina.Edward@epa.gov>

Subject: FIFRA-Prop 65 Issue

Hi Ed,

I hope you've been well, and congrats on your new acting position in the Office of Pesticide Programs. I hope you're enjoying things there.

As fate would have it, there is an issue I'd like to discuss with you and your staff regarding overlapping state and federal jurisdiction on pesticide labeling. It's an issue that one of our clients is facing in applying California's new Prop 65 warnings, which will become effective on August 30, 2018, to a FIFRA-regulated package. Our client, Harvest Power, has a licensing agreement that allows it to sell a mulch product manufactured by another company called Lebanon Seaboard. Since the mulch contains a pesticide, EPA considers the whole product to be a pesticide and subject to FIFRA's labeling requirements. Lebanon Seaboard has had a label for the mulch approved in the past, but it is now in the process of adding a new warning to the label as a result of California's amended Prop 65 law. Although Lebanon Seaboard has been in contact with your staff to obtain EPA approval for the new label, the sense given is that it may take six months to a year for the agency to do so, and Harvest is concerned about continuing to put its product into commerce with a label that may turn out to be legally deficient.

Here is some brief additional background and context:

- California's Prop 65 requires companies to include, on products containing certain substances listed under California law, a clear and reasonable warning stating that a chemical is present that causes cancer or reproductive harm. In 2016, California adopted new requirements under

Prop 65, specifying that companies must include the name of the substance causing the harm and the word “warning”. Companies must have these new labels on their products by August 30, 2018.

- In our case, the manufacturer of the mulch product must include a Prop 65 warning for “wood dust,” which California has classified as a carcinogen. None of the pesticide chemicals contained in the product are listed or require a warning. The problem our client is experiencing is that Harvest Power must first comply with FIFRA’s labeling requirements (which apply to all of the packaging) *before* they can add this Prop 65 warning to their mulch packaging.
- This creates two unique challenges.
 - First, Prop 65’s new warnings require the use of the word “warning”, which has a specific meaning on FIFRA labels. In order to avoid any potential conflict, California recently proposed a change to the Prop 65 requirements to allow companies to use the word “notice” or “attention” on FIFRA regulated product packaging rather than signal words such as “warning,” which have a specific meaning under FIFRA. We would like to determine whether EPA finds this to be an acceptable way of complying with both Prop 65 and FIFRA.
 - Second, depending on the changes to a FIFRA-approved label, a company must either provide notice to EPA of the change or obtain an affirmative pre-market approval of the labeling change. We would like to confirm that EPA believes advance approval by EPA is unnecessary for adding the California-specific warning for wood dust. It’s probably worth noting that manufacturers of mulch products that do not contain pesticides are applying the wood dust warning without advance governmental approval.

Lebanon has been submitting applications for approval of a new Prop 65-compliant FIFRA label for the mulch (EPA Reg. No. 961-408) and discussing this matter with Rachel Holloman and Reuben Baris of EPA. We understand resource constraints suggest the Agency may take up to a year to approve the new label, but in the meanwhile, Harvest Power is left to decide whether to stop selling its product or risk violating EPA regulations.

Any advice or assistance your office can provide will be greatly appreciated. Please let me know if we can schedule a short 30-minute meeting to discuss these issues.

Thanks very much,

Matt

Matthew W. Morrison | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t 202.663.8036 | f 202.663.8007 | m 571.253.3335
matthew.morrison@pillsburylaw.com | [website bio](#)
<imagec5fdcc.PNG>
[<image8c2952.PNG>](#)

The contents of this message, together with any attachments, are intended only for the use of the individual or entity to which they are addressed and may contain information that is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender or the Pillsbury Winthrop Shaw Pittman Help Desk at Tel: 800-477-0770, Option 1, immediately by telephone or by return E-mail and delete this message, along with any attachments, from your computer. Thank you.